



## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

#### 49 CFR Part 372

[Docket No. FMCSA-2023-0007]

RIN 2126-AC57

### Exemption from Operating Authority Regulations for Providers of Recreational Activities

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** FMCSA proposes the implementation of the statutory exemption from its operating authority registration rules for providers of recreational activities. The exemption would apply to motor carriers operating a motor vehicle designed or used to transport between 9 and 15 passengers (including the driver), whether operated alone or with a trailer attached to the transport vehicle, if the motor vehicle is operated by a person that provides recreational activities within a 150 air-mile radius of the location at which passengers initially boarded the motor vehicle at the beginning of the trip. FMCSA also proposes to define *recreational activities* to clarify the scope of this exemption.

**DATES:** Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments identified by Docket Number FMCSA-2023-0007 using any of the following methods:

- Federal eRulemaking Portal: Go to <https://www.regulations.gov/docket/FMCSA-2023-0007/document>. Follow the online instructions for submitting comments.

- Mail: Dockets Operations, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001.
- Hand Delivery or Courier: Dockets Operations, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Dockets Operations.
- Fax: (202) 493-2251.

**FOR FURTHER INFORMATION CONTACT:** Mr. Antonio Harris, Registration, Licensing and Insurance Division, Office of Research and Registration, FMCSA, 1200 New Jersey Avenue SE, Washington, DC 20590-0001; (202) 366-2964; [antonio.harris@dot.gov](mailto:antonio.harris@dot.gov). If you have questions on viewing or submitting material to the docket, call Dockets Operations at (202) 366-9826.

**SUPPLEMENTARY INFORMATION:**

FMCSA organizes this notice of proposed rulemaking (NPRM) as follows:

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## **I. PUBLIC PARTICIPATION AND REQUEST FOR COMMENTS**

### **A. Submitting Comments**

If you submit a comment, please include the docket number for this NPRM (FMCSA-2023-0007), indicate the specific section of this document to which your comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to <https://www.regulations.gov/docket/FMCSA-2023-0007/document>, click on this NPRM, click “Comment,” and type your comment into the text box on the following screen.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period.

### **Confidential Business Information (CBI)**

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to the NPRM contain

commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to the NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission that constitutes CBI as “PROPIN” to indicate it contains proprietary information. FMCSA will treat such marked submissions as confidential under the Freedom of Information Act, and they will not be placed in the public docket of the NPRM. Submissions containing CBI should be sent to Mr. Brian Dahlin, Chief, Regulatory Evaluation Division, Office of Policy, FMCSA, 1200 New Jersey Avenue SE, Washington DC 20590-0001. Any comments FMCSA receives not specifically designated as CBI will be placed in the public docket for this rulemaking.

**B. Viewing Comments and Documents**

To view any documents mentioned as being available in the docket, go to <https://www.regulations.gov/docket/FMCSA-2023-0007/document> and choose the document to review. To view comments, click this NPRM, then click “Browse Comments.” If you do not have access to the internet, you may view the docket online by visiting Dockets Operations in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590-0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Dockets Operations.

**C. Privacy**

DOT solicits comments from the public to better inform its regulatory process, in accordance with 5 U.S.C. 553(c). DOT posts these comments, without edit, including any personal information the commenter provides, to [www.regulations.gov](http://www.regulations.gov), as described in the system of records notice (DOT/ALL 14 – Federal Docket Management System),

which can be reviewed at <https://www.govinfo.gov/content/pkg/FR-2008-01-17/pdf/E8-785.pdf>.

## II. EXECUTIVE SUMMARY

### A. Purpose and Summary of the Regulatory Action

Section 23012 of the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117-58, 135 Stat. 429 (H.R. 3684, Nov. 15, 2021)) amended 49 U.S.C. 13506 by adding, in paragraph (b)(4), a new exemption from FMCSA's operating authority registration requirements. FMCSA proposes the addition of new regulatory text implementing this statutory exemption. The exemption from operating authority registration applies to motor carriers operating a motor vehicle designed or used to transport between 9 and 15 passengers (including the driver), whether operated alone or with a trailer attached to the transport vehicle, if the motor vehicle is operated by a person<sup>1</sup> that provides recreational activities and the transportation is provided within a 150 air-mile radius of the location at which passengers initially boarded the motor vehicle at the outset of the trip.

FMCSA also proposes to define *recreational activities* to clarify the scope of this exemption. The statute, which requires that the motor vehicle be operated "by a person that provides recreational activities," does not define *recreational activities*. The proposed definition would clarify the types of recreational activities the Agency has determined would qualify for the exemption in 49 U.S.C. 13506(b)(4). FMCSA limited the proposed definition of *recreational activities* to the types of activities that Congress outlined in the IIJA for another section that uses this term. Section 11512 provided examples of "groups representing recreational activities and interests" in subsection (c)(4) which provided some insight as to legislative intent for the term *recreational activities* in section 23012. The definition FMCSA proposes in implementing section

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<sup>1</sup> While the statute refers to a "person," that term can refer both to an individual or to a motor carrier under the definitions of that term in 49 U.S.C.13102(18) and 1 U.S.C. 1.

23012 includes activities Congress mentioned in section 11512 and also describes activities that fall outside the intended scope of the term. This language is intended to provide context of the activities within the scope of the exemption, based on the intent of Congress, and to allow sufficient flexibility for analysis of the term's applicability to future activities.

#### B. Costs and Benefits

The cost impacts of the proposed definition include changes in paperwork, fees, and insurance costs associated with maintaining operating authority. Because there is no pre-existing definition of *recreational activities*, motor carriers may be interpreting their eligibility for the operating authority exemption in varying ways. Depending on current interpretations, this proposed rule would either increase, decrease, or have no incremental impact on the degree to which the operating authority exemptions are used relative to the baseline. Differences in interpretation between regulated entities and enforcement officials may be hindering consistent enforcement practices, thereby impacting business-related decisions in providing transportation for recreational activities. This rulemaking would resolve this information asymmetry and enforcement differences by creating a common understanding between FMCSA and motor carriers. Because this rulemaking may also lead to an increase in exemption use, it would benefit existing carriers by improving the efficiency of their business operations and increasing both consumer and producer surplus. For new potential providers of recreational activities that were not aware of this exemption, this rulemaking may encourage new entrants into the field.

### III. ABBREVIATIONS

ANPRM	Advance Notice of Proposed Rulemaking
BLS	Bureau of Labor Statistics
CBI	Confidential Business Information
CE	Categorical Exclusion
CFR	Code of Federal Regulations
DOL	U.S. Department of Labor
DOT	Department of Transportation
E.O.	Executive Order

FMCSA	Federal Motor Carrier Safety Administration
FMCSRs	Federal Motor Carrier Safety Regulations
FR	Federal Register
GDP	Gross Domestic Product
ICR	Information Collection Request
IRFA	Initial Regulatory Flexibility Analysis
IIJA	Infrastructure Investment and Jobs Act
MCMIS	Motor Carrier Management Information System
NAICS	North American Industry Classification System
NPRM	Notice of Proposed Rulemaking
OEWS	Occupational Employment and Wage Statistics
OMB	Office of Management and Budget
PIA	Privacy Impact Assessment
PTA	Privacy Threshold Assessment
Secretary	The Secretary of the Department of Transportation
SBA	Small Business Administration
UMRA	Unfunded Mandates Reform Act of 1995
URS	Unified Registration System
U.S.C.	United States Code
USDOT	United States Department of Transportation

#### **IV. LEGAL BASIS FOR THE RULEMAKING**

Section 23012 of the IIJA (Pub. L. 117-58, 135 Stat. 429 (H.R. 3684, Nov. 15, 2021)) amended 49 U.S.C. 13506 by adding a new exemption from the requirement to obtain operating authority registration for “providers of recreational activities” operating passenger vehicles designed or used to transport between 9 and 15 passengers (including the driver) (see 49 U.S.C. 13506(b)(4)). The statute, which requires that the motor vehicle be operated “by a person that provides recreational activities,” does not define *recreational activities*. This NPRM proposes to define *recreational activities* to clarify the scope of the exemption applicability.

Under 49 Code of Federal Regulations (CFR) 1.87(a)(5), the authority of the Secretary of the Department of Transportation (the Secretary) to carry out the functions relating to the registration requirements in 49 U.S.C. 13901 and 13902 is delegated to the FMCSA Administrator. Sections 13901 and 13902 generally require that any person that

wishes to provide transportation subject to jurisdiction under subchapter I of chapter 135<sup>2</sup> must be registered as a *motor carrier*, defined in 49 U.S.C. 13102(14) as “a person providing motor vehicle transportation for compensation.” The requirements of these sections, which are enforced under § 392.9a (“Operating authority”), are the basis for the rules governing applications for operating authority registration in 49 CFR part 365.

## **V. BACKGROUND**

Before commencing operations, any person desiring to engage in for-hire interstate transportation of passengers, regardless of vehicle size or passenger seating capacity, must first obtain operating authority registration, unless a specific exemption applies (49 U.S.C. 13102 (14), 13501, 13506, 13901, 13902, and 49 CFR part 365). The relevant regulations governing such operations derive from Title 49, Subtitle IV, Part B, and are frequently referred to as the “commercial regulations,” (49 U.S.C. 13102(14), 13902 and 49 CFR part 365). Historically, the regulations promulgated pursuant to this authority were largely economic in nature and did not contain new safety requirements. Today, the most substantial regulatory requirements remaining under this authority require for-hire non-exempt motor carriers to maintain evidence of financial responsibility on file with FMCSA at all times, regardless of whether the carrier is actively operating, and to maintain an active process agent filing designating an agent for the receipt of service of process in every state (49 CFR part 366 and 49 CFR 387.301T).<sup>3</sup> The exemptions from the commercial regulations, including the exemption for providers of recreational activities, are enumerated in 49 U.S.C. 13506 and codified in 49 CFR part 372.

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<sup>2</sup> Absent an exemption, the Secretary has jurisdiction over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both, are transported by motor carrier in interstate commerce (49 U.S.C. 13501). This authority has been delegated to the FMCSA Administrator under 49 CFR 1.87(a)(3).

<sup>3</sup> Though providers of recreational activities may not be required to maintain an active process agent filing with FMCSA, other State and Federal law may also require those providers to maintain a process agent in order to engage in business in more than one State. Accordingly, any cost associated with maintaining a process agent, generally, would not automatically be alleviated by this rulemaking.



Congress adopted multiple exemptions to these commercial regulations that provided financial relief for certain industries while still maintaining safety oversight over the same operators. Exemptions from the commercial regulations do not impede the Agency's oversight of operations subject to the Agency's separate safety jurisdiction codified in the Motor Carrier Act of 1935 (Pub. L. 74-255, 49 Stat. 543, Aug. 9, 1935), as amended (the 1935 Act) (codified in 49 U.S.C. 31502); the Motor Carrier Safety Act of 1984 (Pub. L. 98-554, Title II, 98 Stat. 2832, Oct. 30, 1984), as amended (codified in 49 U.S.C. chapter 311); and the Commercial Motor Vehicle Safety Act of 1986 (Pub. L. 99-570, Title XII, 100 Stat. 3207-170, Oct. 27, 1986), as amended (codified in 49 U.S.C. chapter 313). A carrier may be exempt from the commercial regulations, relieving them of the obligation to obtain operating authority, file evidence of financial responsibility, and designation of a process agent. The statutory exemptions in 49 U.S.C. 13506 however, relieve the carrier only of the obligation to file with FMCSA evidence of financial responsibility, not the obligation to maintain financial responsibility when engaged in operations. Thus, if the carrier is operating a commercial motor vehicle as defined in 49 U.S.C. chapter 311, the carrier is still required to maintain minimum levels of financial responsibility in order to operate. (49 U.S.C. 31138 and 49 CFR part 387, subpart B).

The operating authority registration required under 49 U.S.C. 13901, 13902, and 13906, provides FMCSA with information about motor carriers and their operations. Although the requirements for operating authority registration apply only to carriers subject to the Agency's commercial regulations, they also provide FMCSA with an opportunity to evaluate those potential new entrant motor carriers' willingness and ability to comply with all commercial and safety regulations (49 U.S.C. 13902). This opportunity, consistent with the Agency's mission to reduce crashes and fatalities, allows FMCSA to prevent carriers who may pose a significant safety risk from entering the

industry. Motor carriers operating vehicles for compensation, in interstate commerce and not subject to exemption are prohibited from operating without the required operating authority or beyond the scope of the operating authority granted (§ 392.9a). A motor carrier that violates this provision shall be ordered out of service and may be subject to penalties (§ 392.9a(b)).

The Agency, however, also requires registration under its safety jurisdiction, 49 U.S.C. 31134. As a result, if the carrier has registered and received a USDOT number under FMCSA's safety jurisdiction, the Agency will still maintain adequate information to monitor the motor carrier's safety performance and compliance, even if the carrier is not required to obtain operating authority registration.

FMCSA is required to register a motor carrier for operating authority registration under 49 U.S.C. 13902 only if the applicant is willing and able to comply with all statutory and regulatory requirements for registration (49 U.S.C. 13902, 49 U.S.C. 13906, and 49 CFR part 365). To obtain operating authority registration, each applicant is required to file the appropriate form for the scope of its operations (e.g., to operate as a motor carrier of passengers). Applicants that have never held a USDOT number or any other registration issued by FMCSA must file the Unified Registration System (URS) online application (Form MCSA-1) to obtain a USDOT number and register for operating authority. Applicants that already have a USDOT number but desire to expand to an operation requiring operating authority, such as transporting passengers in interstate commerce for compensation, must file the "Application for Motor Passenger Carrier Authority" (Form OP-1(P)), or other appropriate OP-1 series form for the proposed operation to register for operating authority (§ 365.105T), for a fee, currently \$300. Again, among other requirements, the statutory requirements for registration require that the applicant have on file with FMCSA proof of liability insurance meeting the minimum levels of financial responsibility required (49 U.S.C. 13902, 49 U.S.C. 13906, and 49

CFR part 365). Motor carriers must submit the “Motor Carrier Automobile Bodily Injury and Property Damage Liability Certificate of Insurance” (Form BMC-91, for a single insurance provider, or Form BMC-91X, for an aggregation of insurance coverage) to satisfy the financial responsibility requirements. A registration remains in effect only as long as the registrant continues to satisfy these financial responsibility requirements in 49 U.S.C. 13906.

Before the enactment of section 23012 of the IIJA, a provider of recreational activities operating as a motor carrier of passengers was required to maintain insurance at the minimum prescribed levels<sup>4</sup> for the entire year—including the months during which the provider was not operating. As a result, some providers of recreational activities were voluntarily revoking their operating authority registrations<sup>5</sup> during the off-season months by filing Form OCE-46 so that they did not need to maintain insurance at the minimum prescribed levels during those months. To resume operations, the providers were then required to obtain adequate financial responsibility, ensure evidence of financial responsibility is filed with FMCSA on Form BMC-91 or BMC-91X, and request to reinstate their operating authority registrations by submitting the “Motor Carrier Records Change” (MCSA-5889) either online or by paper during the months when they were operating, for an additional fee, currently \$80.<sup>6</sup>

Section 23012 of the IIJA created a new exemption from the requirement to obtain FMCSA operating authority registration for providers of recreational activities

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<sup>4</sup> The minimum levels of financial responsibility required to be maintained by for-hire motor carriers of passengers operating motor vehicles in interstate or foreign commerce can be found in 49 CFR part 387, subpart B. Section 387.31 prohibits a motor carrier from operating a motor vehicle transporting passengers until the motor carrier has obtained and has in effect the minimum levels of financial responsibility as forth in § 387.33. The minimum level of financial responsibility is \$1,500,000 for for-hire motor carriers of passengers operating a vehicle with a seating capacity of 15 passengers or less, including the driver (§ 387.33T).

<sup>5</sup> It should be noted that these revocations did not affect the status of each carrier’s safety registration (USDOT number registration under 49 U.S.C. 31134), which remained intact and was still required to be updated biennially by the motor carrier (§ 390.201).

<sup>6</sup> The MCSA-5889 may be submitted by mail, fax, or filled out online.

[https://ask.fmcsa.dot.gov/app/answers/detail/a\\_id/213/session/L3RpbWUvMTQ0Nzg3MzYwOS9zaWQvQXlsamRRQm0=](https://ask.fmcsa.dot.gov/app/answers/detail/a_id/213/session/L3RpbWUvMTQ0Nzg3MzYwOS9zaWQvQXlsamRRQm0=).

operating a motor vehicle designed or used to transport not fewer than 9, and not more than 15 passengers (including the driver) whether operated alone or with a trailer<sup>7</sup> attached to the transport vehicle if:

1. The motor vehicle is operated by a person that provides recreational activities;
2. The transportation is provided within a 150 air-mile radius of the location at which passengers initially boarded the motor vehicle at the outset of the trip; and
3. In the case of a motor vehicle transporting passengers over a route between a place in a State and a place in another State, the person operating the motor vehicle is lawfully providing transportation of passengers over the entire route in accordance with applicable State law.

In this NPRM, FMCSA is undertaking only to clarify the term *recreational activities*, as the Agency believes that the other provisions in section 23012 are unambiguous.

The recreational activity industry is comprised of numerous companies, associations, and organizations that focus primarily on outdoor activities. Outdoor activities may include hunting, fishing, trapping, camping, exploring caves, nature study, bicycling, horseback riding, bird watching, motorcycling, ballooning, hang-gliding, hiking, tobogganing, sledding, sleigh riding, snowmobiling, skiing, skating, water sports, rock climbing, climbing observation towers, sport shooting, whitewater rafting, and other outdoor sport, game, or educational activities.

Congress did not define the term *recreational activities* in the IIJA and there is no current definition in statute or regulation. The lack of a definition of *recreational activities* has caused confusion for the industry and safety oversight agencies that may result in myriad interpretations and a patchwork of compliance. This NPRM proposes to

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<sup>7</sup> The exemption includes passenger carrier operators who may also be required to have and maintain operating authority to transport property. FMCSA recognizes that a property carrier may also be transporting property for hire within the scope of its recreational activities operation. The Agency believes that the number of carriers requiring additional operating authority to transport property, however, is extremely limited.

define *recreational activities* consistent with the Agency's understanding of congressional intent when establishing the exemption.<sup>8</sup>

## **VI. DISCUSSION OF PROPOSED RULEMAKING**

FMCSA proposes a new § 372.113 that outlines the exemption from operating authority registration for providers of recreational activities in 49 U.S.C. 13506(b)(4). This new section would reflect the statutory language and incorporate the exemption into the FMCSRs.

The Agency also proposes a new definition of *recreational activities* to § 372.107 which would provide a clear description of the types of activities that qualify for the exemption in 49 U.S.C. 13506(b)(4). Based on the statute itself and Congress' use of the term elsewhere in the IIJA, FMCSA believes Congress intended to provide an exemption to providers of recreational activities that consist of outdoor experiences or excursions typically of a physical or athletic nature that do not have transportation as an integral part of the activity itself.

In reaching this conclusion, FMCSA has drawn from the canons of statutory construction and applied the presumption of consistent usage. The U.S. Supreme Court has framed this presumption as "a natural presumption that identical words used in different parts of the same act are intended to have the same meaning" (*Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427, 433 (1932)). The presumption should be "applied...pragmatically" (Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 171 (2012)). FMCSA's interpretation of the types of activities Congress intended to include in the term *recreational activities* is therefore potentially informed by Congress' use of the same term in section 11512 of the IIJA,

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<sup>8</sup> As explained in section VI of this rulemaking, FMCSA's interpretation of the term *recreational activities* has been informed by the legislative history of the IIJA. This interpretation has been further informed by the Agency's experiences in applying the operating authority requirements, particularly by the questions and concerns FMCSA has received from motor carriers regarding voluntary revocation of operating authority, e.g., carriers wishing to cancel or decrease their insurance during the off season.

which directs the Secretary to conduct a nonhighway recreational fuel study. Subsection (c)(4) states the Secretary may consult with groups representing recreational activities and interests, including hiking, biking and mountain biking, horseback riding, water trails, snowshoeing, cross-country skiing, snowmobiling, off-highway motorcycling, all-terrain vehicles and other offroad motorized vehicle activities, and recreational trail advocates (23 U.S.C. 203 note).

The application of this presumption does have limitations. Although the term *recreational activities* is found within the same act, it is used in different titles of this lengthy legislation, and applies to different operating administrations within DOT. Nonetheless, while the use of this term in section 11512 is not dispositive of its meaning in section 13506, it can still be potentially informative of Congress' intent. Applying the presumption of consistent usage pragmatically, the language in section 11512 potentially provides insight into the types of activities that Congress intended to be covered by the term *recreational activities* under section 13506 of the IIJA. Accordingly, FMCSA limited the proposed definition of *recreational activities* to similar types of activities, as informed by FMCSA's experience.<sup>9</sup>

Based on these findings, FMCSA proposes to define *recreational activities* which qualify for the exemption under 49 U.S.C. 13506(b)(4) as

...activities consisting of an outdoor experience or excursion typically of a physical or athletic nature which require transportation for the sole purpose of moving customers to another location or locations where the experience or excursion will take place and collecting those customers to

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<sup>9</sup>See Footnote 8. For example, in response to a DOT notice requesting that the public identify and provide input on the Department's existing guidance documents that are good candidates for repeal, replacement, or modification (84 FR 1820, Feb. 5, 2019), the America Outdoors Association (AOA) submitted an undated comment to the Docket (received Apr. 8, 2019) requesting that FMCSA amend its guidance on operating authority, stating that the costs to reinstate operating authority were an unnecessary expense with no added safety benefit. See <https://www.regulations.gov/comment/DOT-OST-2017-0069-2865>. (The comment is also available in the docket for this rulemaking.) AOA requested, in part, that FMCSA provide an exemption from the operating authority requirements for transportation by 9 to 15 passenger vehicles, when such transportation is provided by an entity that provides recreational activities, is not for direct compensation, and is provided entirely within a 150 air-mile radius of trip origination, provided that drivers carry appropriate commercial driver's licenses if needed, the State in which the vehicle is registered has adopted Federal inspection standards, and the operator is in compliance with State requirements.

transport them back to the place of initial boarding or another outpost of the motor carrier.

Recreational activities under this proposed definition would include things such as hiking, biking, horseback riding, canoeing, whitewater rafting, water trails, tubing, skiing, snowshoeing, snowmobiling, hunting, fishing, mountain climbing, and swimming. While this list of activities in the proposed definition is not all inclusive, it provides sufficient examples to clarify the specific types of activities that would qualify for the exemption.

FMCSA believes that, by including the language a person “that provides” recreational activities in the exemption, Congress intended to limit the exemption to only those persons that are actually providing recreational activities. There is no reason to infer that Congress intended for the “providers of recreational activities” exemption to apply to persons providing transportation as their core business or providing transportation concurrently with an activity (where the transportation is no longer incidental to the activity itself). These types of activities are distinct from those contemplated by Congress as exempt because the act of transporting passengers from one location to another is the central aspect of the service that the motor carriers are providing.

For instance, FMCSA does not believe Congress intended to exempt activities where the service provided by the motor carriers mainly focuses on transportation from one location to another. In such cases, the motor carrier’s business is in fact selling transportation—not providing recreational activities. A bus company offering scheduled route service with multiple stops would not fall within the exemption, for example, merely because one of the scheduled stops was at or near a water park or a horseback riding stable. Likewise, motor carriers that advertise and provide alcohol, music, or other “party” activities on board the vehicle as the principal activity or purpose of the

transportation would not be eligible for the exemption.<sup>10</sup> In situations like those described above, the activity cannot be completed and has no purpose without the transportation. The transportation in such circumstances is integral to the activities, rather than incidental. Accordingly, the proposed definition in § 372.107 would explicitly exclude any activity for which: 1) the activity offered or sold is occurring simultaneously with the transportation; or 2) the transportation is the primary service offered for sale. FMCSA solicits comment on whether the exclusions at the end of the proposed definition increase clarity. Should the agency include these exclusions at the end of the definition, remove them from the definition, or take another approach to communicate which activities would not fall within the definition in a final rule?

The exemption in 49 U.S.C. 13506(b)(4) is already in effect. This rulemaking is intended to codify the statute and provide clarity regarding which motor carriers qualify for the exemption. Motor carriers that qualify for the exemption in 49 U.S.C. 13506(b)(4) are not subject to the requirement to register for or maintain operating authority as a motor carrier of passengers.

New motor carriers that need a USDOT number, even those that qualify for the exemption, would be required to register via URS (MCSA-1). Such carriers would indicate in the Operation Classification section that they will be transporting passengers for compensation but that they are exempt pursuant to 49 U.S.C. 13506. Motor carriers with a USDOT number that do not currently have operating authority as motor carriers of passengers and would qualify for the exemption do not have to file Form OP-1(P) to obtain operating authority.

Motor carriers that currently have operating authority as motor carriers of passengers and qualify for the exemption are able to voluntarily revoke their operating

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<sup>10</sup> FMCSA specifically mentions these activities because the Agency has received questions from motor carriers regarding the applicability of the exemption to these activities.



authority under 49 U.S.C. 13905(d) as discussed in the background section above. After doing so, these motor carriers are no longer required to obtain or reinstate operating authority and thus, no longer required to have their insurance coverage or process agent designation on file with FMCSA (49 CFR parts 365 and 366 and § 387.301T). If a motor carrier does not voluntarily revoke its operating authority registration and fails to maintain evidence of the required level of insurance coverage on file with FMCSA, its operating authority registration will be revoked involuntarily by FMCSA.

These motor carriers would no longer need to have evidence of financial responsibility on file with FMCSA (through either Form BMC-91 or BMC-91X). However, the inapplicability of the insurance coverage filing requirement in 49 CFR part 365 and § 387.301T does not affect a motor carrier's obligation to maintain minimum levels of financial responsibility as set forth in § 387.33. As discussed above in the background section, a provider of recreational activities operating as a motor carrier of passengers is required to maintain insurance at the minimum prescribed levels while they are in operation. Additionally, a motor carrier that is no longer subject to Federal insurance requirements while not in operation may nonetheless still be required to maintain insurance coverage to meet applicable State requirements in those States in which the motor carrier operates.

Some motor carriers may have already voluntarily revoked their operating authority registration by filing Form OCE-46 under the exemption in 49 U.S.C. 13506(b)(4). Some of these motor carriers may have correctly revoked their operating authority because they meet the requirements in 49 U.S.C. 13506(b)(4) and provide transportation for activities that fall under the proposed definition in this rulemaking. If the Agency were to issue its proposed definition as a final rule, these exempt motor carriers would be permitted to continue to operate without operating authority. Other motor carriers may have incorrectly revoked their operating authority because they

provide transportation for one or more activities that they mistakenly believed would fall under the scope of the statute, but do not, in fact, fall within such scope as clarified by the proposed definition in this rulemaking. These motor carriers are currently required, and would continue to be required, to reinstate their operating authority registration and have their insurance coverage on file with FMCSA in order to continue operating.<sup>11</sup>

## **VII. SECTION-BY-SECTION ANALYSIS**

This section-by-section analysis describes the proposed changes in numerical order.

### **Section 372.107 Definitions.**

FMCSA would add a new paragraph (i), which would contain a definition for *recreational activities*.

### **Section 372.113 Providers of Recreational Activities.**

FMCSA would add a new § 372.113 to subpart A of 49 CFR part 372. This new section would outline the exemption from operating authority registration in 49 U.S.C. 13506(b)(4).

## **VIII. REGULATORY ANALYSES**

### **A. Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review), E.O. 14094 (Modernizing Regulatory Review), and DOT Regulatory Policies and Procedures**

FMCSA has considered the impact of this NPRM under E.O. 12866 (58 FR 51735, Oct. 4, 1993), Regulatory Planning and Review, E.O. 13563 (76 FR 3821, Jan. 21, 2011), Improving Regulation and Regulatory Review, and by E.O. 14094 (88 FR 21879, Apr. 11, 2023), Modernizing Regulatory Review. The Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB) determined that

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<sup>11</sup> Motor carriers may reinstate their operating authority using the procedure detailed at [https://ask.fmcsa.dot.gov/app/answers/detail/a\\_id/213/~how-do-i-make-my-mc%2Fff%2Fmx-number-active-%28request-to-reinstate-or-reactivate](https://ask.fmcsa.dot.gov/app/answers/detail/a_id/213/~how-do-i-make-my-mc%2Fff%2Fmx-number-active-%28request-to-reinstate-or-reactivate).

this notice of proposed rulemaking is not a significant regulatory action under section 3(f) of E.O. 12866, as supplemented by E.O. 13563 and E.O. 14094, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order.

Accordingly, OMB has not reviewed it under that E.O.

### **Purpose**

This rulemaking would codify the exemption for providers of recreational activities in regulation and define *recreational activities* to clarify the scope of this exemption by providing a clear description of what types of recreational activities do and do not qualify for the exemption in 49 U.S.C. 13506(b)(4). This would ensure that providers of recreational activities are aware of their eligibility for the exemption from filing for operating authority that FMCSA proposes to add in new § 372.113.

Specifically, this rulemaking would affect motor carriers operating a motor vehicle designed or used to transport between 9 and 15 passengers (including the driver), whether operated alone or with a trailer attached to the transport vehicle, if the motor vehicle is operated by a person that provides recreational activities and the transportation is provided within a 150 air-mile radius of the location at which passengers initially boarded the motor vehicle at the outset of the trip.

This proposed rule is to provide clarity to both motor carriers and enforcement officials regarding which carriers qualify for the new exemption in section 23012 of the IIJA as of November 15, 2021. Because Congress did not define *recreational activities* and there is no pre-existing definition of *recreational activities* in statute or regulation, FMCSA proposes bringing the FMCSRs into alignment with the IIJA's exemption. This clarity would resolve possible information asymmetry currently affecting the regulated industry and enforcement officials as to which carriers qualify for the operating authority exemption.

## **Baseline**

For the purposes of this analysis, the changes proposed in this rule are compared to the baseline established by section 23012 of the IIJA and the current requirements for providers of recreational activities under 49 U.S.C. 13901 and 13902 and 49 CFR part 365. As discussed above, the IIJA created a new exemption from the requirement to obtain FMCSA operating authority registration for providers of recreational activities. Accordingly, this exemption has been available to these motor carriers since the IIJA was enacted on November 15, 2021. Therefore, the incremental impacts of this proposed rule relative to the baseline lie in how the affected industry and enforcement officials have been interpreting the term in the absence of a definition in the FMCSRs.

## **Uncertainties**

The Agency relies on the Motor Carrier Management Information System (MCMIS) database to obtain information on commercial motor carriers subject to the FMCSRs. While MCMIS does contain data on passenger vehicle size (e.g., weight and capacity) and type, it does not track industry type, nor whether an operating authority exemption is applicable. Consequently, the Agency knows neither the magnitude of the population that would be affected by this rulemaking, nor the degree to which passenger carriers are currently taking advantage of the exemption. Therefore, FMCSA describes how different carriers would be impacted by costs and benefits on a per-unit basis, depending on their current behavior. The Agency invites the public to provide information on the size of this industry.

## **Costs**

The resulting cost impacts of the definitional clarification proposed in this rulemaking include changes in paperwork, fees, and insurance costs associated with maintaining operating authority. Because there is no pre-existing definition of *recreational activities*, motor carriers may be interpreting their eligibility for the

operating authority exemption in varying ways. Depending on current interpretations, this proposed rule would either increase, decrease, or have no incremental impact on the degree to which the operating authority exemptions are used relative to the baseline. Because FMCSA is unable to ascertain how various carriers interpreted this exemption set forth by section 23012 of the IIJA in 2021, the Agency estimates the impacts of this rulemaking based on four hypothetical scenarios. The Agency also invites the public to provide additional information on the degree to which this exemption is being used.

## Forms

Currently, there are several forms that providers of recreational activities are responsible for submitting to FMCSA in order to maintain operating authority registration. As detailed later in this analysis, the use of these forms, as explained in table 1, may change as a result of this proposed rule, depending on how the affected carriers are interpreting this exemption.

**Table 1. Forms Currently Used in Maintaining Operating Authority**

Form	Affected Groups
Motor Carrier Automobile Bodily Injury and Property Damage Liability Certificate of Insurance (BMC-91 or BMC-91X)	Carriers that must provide proof of liability insurance meeting the minimum levels of financial responsibility
Motor Carrier Records Change (MCSA-5889)	Carriers reinstating operating authority
Request for Revocation of Authority Granted (OCE-46)	Carriers voluntarily revoking operating authority
Application for Motor Passenger Carrier Authority (OP-1(P))	Carriers with an existing USDOT number wishing to expand to an operation requiring operating authority

Tables 2 and 3 display the paperwork burden of these forms to private entities and to the Government, respectively. These estimates are based on the Information Collection Request (ICR) supporting statements associated with each form. For example, table 2 shows that Forms BMC-91 and BMC-91X are estimated to take 10 minutes to complete

by an insurance claims and policy processing clerk at a wage rate<sup>12</sup> of \$38.72, leading to a paperwork burden of \$6 (10 minutes  $\times$  \$38.72 = \$6).<sup>13, 14</sup>

**Table 2. Paperwork Costs to Private Sector (2021\$)**

Paperwork	Wage	Hours to Submit Form	Cost per Form	Filing Fee	Total Cost
Forms BMC-91 or BMC-91X by insurance claims processor	\$38.72	0.17	\$6	--	\$6
Form MCSA-5889 by office clerk	\$31.90	0.25	\$8	\$80	\$88
Form OCE-46 by office clerk	\$31.90	0.25	\$8	--	\$8
Form OP-1(P) by office clerk	\$31.90	2	\$64	\$300	\$364

Estimates may not total due to rounding.

**Table 3. Paperwork Costs to Government (2021\$)**

Paperwork	GS-9, Step 5 Wage	Hours to Submit Form	Cost per Form
Form MCSA-5889	\$70.31	0.25	\$18
Form OCE-46	\$70.31	0.25	\$18
Form OP-1(P)	\$70.31	6.5	\$457

Estimates may not total due to rounding.

FMCSA computes its estimates of labor costs using data gathered from several sources. Labor costs comprise wages, fringe benefits, and overhead. Fringe benefits include paid leave, bonuses and overtime pay, health and other types of insurance, retirement plans, and legally required benefits (Social Security, Medicare, unemployment insurance, and workers compensation insurance). Overhead includes any expenses to a firm associated with labor that are not part of employees' compensation; this typically includes many types of fixed costs of managing a body of employees, such as management and human resource staff salaries or payroll services. The economic costs of labor to a firm should include the costs of all forms of compensation and labor-related

<sup>12</sup> DOL, BLS. Occupational Employment and Wage Statistics (OEWS). National. May 2021. 43-9041 Insurance Claims and Policy Processing Clerks. Available at: <https://www.bls.gov/oes/current/oes439041.htm> (accessed Jan. 5, 2023).

<sup>13</sup> This estimate is based on the calculations used in the ICR titled, "Financial Responsibility Motor Carriers, Freight Forwarders and Brokers," covered by OMB Control Number 2126-0017.

<sup>14</sup> The supporting statement for the "Financial Responsibility Motor Carriers, Freight Forwarders and Brokers" ICR estimates Government costs for Forms BMC-91 and BMC-91X at \$0, as they are filed electronically.

expenses. For this analysis, costs of labor to a firm have been calculated relative to total compensation (base wages, plus fringe benefits, plus overhead).

The primary source for industry wages is the median hourly wage data (May 2021) from the U.S. Department of Labor (DOL), Bureau of Labor Statistics (BLS), Occupational Employment and Wage Statistics (OEWS).<sup>15</sup>

BLS does not publish data on fringe benefits for specific occupations, but it does for the broad industry groups in its Employer Costs for Employee Compensation release. For office clerk employees, this analysis uses an average hourly wage of \$26.45 and average hourly benefits of \$13.78 for private industry workers in “transportation and warehousing”<sup>16</sup> to estimate that fringe benefits are equal to 52 percent ( $\$13.78 \div \$26.45$ ) of wages. For insurance claims processors, this regulatory impact analysis uses an average hourly wage of \$33.93 and average hourly benefits of \$16.92 for private industry workers in “financial activities”<sup>17</sup> to estimate that fringe benefits are equal to 50 percent ( $\$16.92 \div \$33.93$ ) of wages.

For estimating the overhead rates on wages, the Agency used industry data gathered for the Truck Costing Model developed by the Upper Great Plains Transportation Institute, North Dakota State University as a proxy for the overhead cost of employees in the transportation intermediary and surety and trustee industries.<sup>18</sup> Research conducted for this model found an average cost of \$0.107 per mile of commercial motor vehicle operation for management and overhead, and \$0.39 per mile

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<sup>15</sup> DOL, BLS. *Occupational Employment and Wage Statistics (OEWS). National. May 2021*. Available at: [https://www.bls.gov/oes/current/oes\\_nat.htm/oesm21nat.zip](https://www.bls.gov/oes/current/oes_nat.htm/oesm21nat.zip) (accessed Apr. 12, 2022).

<sup>16</sup> DOL, BLS. *Table 4: Employer costs for Employee Compensation for private industry workers by occupation and industry group, Dec 2019*. Available at: [https://www.bls.gov/news.release/archives/ecec\\_03192020.pdf](https://www.bls.gov/news.release/archives/ecec_03192020.pdf) (accessed Apr. 13, 2022).

<sup>17</sup> Ibid.

<sup>18</sup> Berwick, Farooq. *Truck Costing Model for Transportation Managers*. North Dakota State University. Upper Great Plains Transportation Institute. August 2003. Appendix A, pp. 42-47. Available at: <http://www.mountain-plains.org/pubs/pdf/MPC03-152.pdf> (accessed Apr. 13, 2022).

for labor, indicating an overhead rate of 27 percent (27 percent =  $\$0.107 \div \$0.39$ , rounded to the nearest whole percent).

It is assumed that FMCSA reviewers will be Federal Government employees located in the Washington D.C. region at the GS-9 Step 5 wage rate.<sup>19</sup> OPM does not publish annual rates that include fringe benefits or overhead. OMB does publish an object class analysis of the budget of the U.S. Government. The Object Class Analysis estimates that, in 2021, DOT spent \$6,351 million in employee compensation and \$2,840 million in employee benefits. FMCSA estimates a fringe benefit rate of 45 percent ( $2,840 \div 6,351$ ) for FMCSA personnel. FMCSA uses the DOT Volpe Center overhead rate of 64 percent for Federal personnel.<sup>20</sup> The Volpe Center is a Federal fee-for-service research and innovation center in the DOT. Unlike most Federal agencies, Volpe receives no direct appropriation from Congress and must cover direct and indirect expenses through agreements with project sponsors.<sup>21,22</sup> These indirect costs are recovered through the overhead rate charged on direct labor costs. Volpe employees are compensated according to the Federal locality pay tables used for all Federal employees and their labor costs include the same employee benefits. Therefore, FMCSA believes that the overhead rate for Volpe personnel is similar to the rate for all DOT personnel.

## **Insurance**

In addition to submitting forms to FMCSA, providers of recreational activities wishing to maintain a valid operating authority registration must also have proof of liability insurance filed with FMCSA, as explained in section V of this NPRM. The

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<sup>19</sup> OPM Pay & Leave Salaries & Wages. Salary Table 2022-DCB, Hourly Basic (B) Rates by Grade and Step. Available at [https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/22Tables/html/DCB\\_h.aspx](https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/22Tables/html/DCB_h.aspx) (accessed Jan. 5, 2023).

<sup>20</sup> DOT, Volpe Center. *Volpe Project Costs*. Available at: <http://www.volpe.dot.gov/work-with-us/volpe-project-costs> (accessed Apr. 9, 2022).

<sup>21</sup> DOT, Volpe Center. *How to Initiate Work*. Available at: <http://www.volpe.dot.gov/work-with-us/how-initiate-work> (accessed Apr. 13, 2022).

<sup>22</sup> DOT, Volpe Center. *Volpe Project Costs*. Available at: <http://www.volpe.dot.gov/work-with-us/volpe-project-costs> (accessed Apr. 13, 2022).



Agency estimates that such liability insurance currently costs entities an average of \$190 per month for one vehicle, or \$2,280 per year ( $\$190 \times 12 = \$2,280$ ).<sup>23</sup> Using a range of fleet sizes for illustrative purposes, table 4 presents the estimated costs currently associated with maintaining liability insurance by fleet size. The Agency invites the public to provide additional information on these estimates.

**Table 4. Current Insurance Estimates by Fleet Size (2022\$)**

Number of Vehicles in Fleet	Monthly Premium	Yearly Premium
1	\$190	\$2,280
5	\$950	\$11,400
10	\$1,900	\$22,800

*Scenario One: Increase in Exemption Use*

Scenario One includes existing providers of recreational activities that have been eligible for the operating authority exemption established by section 23012 of the IIJA in 2021 but are not utilizing it due to the definitional ambiguity of *recreational activities*. Upon issuance of this rulemaking, such carriers would understand they classify as a provider of recreational activities and are, therefore, eligible for this exemption. This would lead to an incremental increase in the number of operational authority exemptions being used relative to the baseline. As explained in detail below, these carriers would be impacted in different ways by the following costs and cost savings: financial responsibility compliance costs, operating authority registration fees, and paperwork costs.

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<sup>23</sup> Insuranks Online Insurance Comparison Marketplace. <https://www.insuranks.com/commercial-van-insurance> (accessed Oct. 31, 2022). These estimates are quoted from 12 different insurance companies, including Geico, Progressive, State Farm, and others. The monthly quotes were summed and then divided by 12 to obtain an estimated monthly average for the industry:  $(\$115 + \$120 + \$130 + \$183 + \$165 + \$180 + \$195 + \$210 + \$221 + \$232 + \$254 + \$270) \div 12 = \$190$ .

### *Financial Responsibility Under Scenario One*

Carriers under Scenario One that are currently maintaining their operating authority registration year-round would experience cost savings associated with maintaining financial responsibility. As displayed in table 4, the Agency estimates that the liability insurance required for carriers to maintain operating authority registration costs an average of \$2,280 per year for one vehicle. Carriers under this scenario would save on insurance costs during the months they are not in operation (such as off-season months). In other words, carriers operating one vehicle would only pay for the months they need to be insured instead of the full \$2,280 per year, or \$190 per month, to operate one vehicle.

The Agency estimates a range of annual insurance cost savings from \$190 to \$17,100, depending on the number of vehicles a carrier owns and the number of months they currently maintain operating authority. These estimates are derived by multiplying the monthly insurance premiums according to fleet size in table 4 by the number of months they operate per year. Therefore, if a carrier with one vehicle is currently operating for one month per year, their annual cost savings would be \$190 (1 month of insurance premiums  $\times$  1 vehicle). If a carrier with 10 vehicles is currently operating for 9 months per year, their annual cost savings would be \$1,900 multiplied by 9 months (\$17,100).

To illustrate further, table 5 displays estimated insurance cost savings of this rulemaking for a carrier operating five vehicles, as a result of no longer incurring year-round insurance costs. For example, using the values from table 4, the Agency estimates that a carrier operating five vehicles currently pays an average of \$950 per month, or \$11,400 per year, to maintain liability insurance. If such a carrier only maintained operating authority for 3 months, their cost savings would be \$8,550 per year ( $\$950 \times 3$  months = \$2,850.  $\$2,850 - \$11,400 = -\$8,550$ ).

**Table 5. Insurance Costs by Number of Months in  
Operation: 5-Vehicle Fleet (2022\$)**

<b>Number of Months in Operation</b>	<b>Yearly Premium for 5 Vehicles</b>	<b>Cost Savings</b>
1	\$950	(\$10,450)
3	\$2,850	(\$8,550)
9	\$8,550	(\$2,850)

Note: estimates may not total due to rounding.

There would also be cost savings as a result of avoided insurance-related administrative requirements. Currently, carriers must choose an insurance plan or other acceptable form of financial responsibility, and have proof filed with FMCSA whenever they apply for or reinstate operating authority. The Agency estimates that it takes carriers 8 hours to research and identify which insurance company, financial surety, or bond provider they will use. Assuming this task is performed by an office clerk, this activity is estimated to cost each carrier \$255 ( $\$31.90 \times 8 \text{ hours} = \$255$ ).<sup>24</sup> The Agency welcomes input from the public on the amount of time spent researching financial responsibility options.

As displayed in table 2, carriers under Scenario One were also required to ensure that their financial responsibility provider submit Forms BMC-91 or BMC-91X to FMCSA at a cost of \$6 per form. These administrative requirements for insurance were no longer required after the enactment of the IIJA in 2021; therefore, the definitional clarification in this proposed rule may lead to cost savings of \$255 to the carrier and \$6 to the insurance company.

#### *Voluntary Revocation Under Scenario One*

As detailed in section V of this NPRM, some carriers under Scenario One were filing Form OCE-46 to voluntarily revoke their operating authority registrations during the off-season months so that they did not need to maintain insurance at the minimum

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<sup>24</sup> DOL, BLS. Occupational Employment and Wage Statistics (OEWS). National. May 2021. 43-9061 Office Clerks, General. Available at: <https://www.bls.gov/oes/current/oes439061.htm> (accessed Jan. 5, 2023).

prescribed levels during those months. To resume operations, the providers were then required to submit Form MCSA-5889 to reinstate their operating authority registrations during the months when they were operating. As displayed in tables 2 and 3, it is estimated to cost \$8 to submit Form MCSA-5889, with a fee of \$80 to carriers, and \$18 to FMCSA.<sup>25</sup> Form OCE-46 is also estimated to cost \$8 per carrier and \$18 for FMCSA processing time.<sup>26</sup> As a result of this rulemaking, carriers under this scenario would no longer be subject to the costs associated with submitting Form MCSA-5889 or Form OCE-46.

*Scenario Two: Decrease in Exemption Use*

It is also possible that this rulemaking would limit the use of this exemption for certain carriers. Because neither FMCSA nor Congress provided a definition of *recreational activities*, there may be carriers that incorrectly believed they are providers of recreational activities, but upon issuance of this rulemaking, would realize they are not. These carriers may currently be incorrectly utilizing this exemption and revoking their operating authority when they were not eligible to do so. Therefore, such carriers may incur a cost of \$88 to submit Form MCSA-5889 as a result of this rulemaking for reinstatement of their operating authority (table 2). They would also need to resume paying for financial responsibility in order to maintain valid operating authority. Illustrative examples of possible insurance-related costs are displayed in Tables 4 and 5. FMCSA invites public comment on the number of carriers that would no longer be using this exemption as a result of this rulemaking.

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<sup>25</sup> This estimate is based on the calculations used in the ICR titled, “Motor Carrier Records Change Form” (Form MCSA-5889), covered by OMB Control Number 2126-0060. The cost of a paper submission is \$6 and the cost of an electronic submission is \$0.

<sup>26</sup> This estimate is based on the calculations used in the ICR titled “Request for Revocation of Authority Granted,” covered by OMB Control Number 2126-0018.

### *Scenario Three: No Incremental Change in Exemption Use*

There may also be eligible carriers that correctly interpreted Congress' intent and have been utilizing the exemption correctly since the IIJA's enactment. These carriers are not expected to be impacted by this proposed rule relative to the baseline. They have already gone through the steps of voluntarily revoking their operating authority with FMCSA, are maintaining financial responsibility only while in operation, and are not paying fees or completing paperwork associated with maintaining operating authority.

### *Scenario Four: New Providers*

This proposed rule may also affect eligible providers considering engaging in providing recreational activities in the future. If there are new carriers considering entering this field that were not aware of the IIJA exemption, they would no longer need to account for the following costs as a result of this rulemaking: year-round financial responsibility premiums, financial responsibility-related administrative costs, and operating authority fees and paperwork. The Agency invites public comment on the industry's trajectory and how many new entrants can be expected annually.

Prior to the enactment of the IIJA, new providers of recreational activities would have had to submit the "Application for Motor Passenger Carrier Authority" (Form OP-1(P)).<sup>27</sup> The Agency estimates that this form costs \$64 with a \$300 fee for carriers, and \$457 in Government costs (Tables 2 and 3, respectively).<sup>28</sup> Additionally, as described in the *Financial Responsibility under Scenario One* section, the avoided insurance-related administrative costs would be \$6 for insurance companies and \$255 for carriers. An illustrative example of potential avoided insurance premium costs is presented in table 5.

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<sup>27</sup> Applicants that have never held a USDOT number or any other registration issued by FMCSA must file the URS online application (Form MCSA-1) to obtain a USDOT number and register for operating authority.

<sup>28</sup> This estimate is based on calculations used in the ICR titled "Licensing Applications for Motor Carrier Operating Authority," covered by OMB Control Number 2126-0016.

## **Government Costs**

These changes would not require additional training for enforcement personnel. The Agency expects that the definitional clarification set forth in this NPRM would be communicated to FMCSA personnel and the Agency's State-based enforcement partners through existing means, such as policy updates and ongoing training. The Agency would be impacted by the costs and cost savings associated with this NPRM, as outlined in table 3 (\$457 for Form OP-1(P), \$18 for Form OCE-46 and Form MCSA-5889).

## **Benefits**

The affected entities would be providers of recreational activities that typically consist of physically demanding outdoor experiences or excursions that do not have transportation as an integral part of the activity itself. Overall, the outdoor recreation economy accounted for 1.9 percent (\$454 billion) of current-dollar gross domestic product (GDP) for the nation in 2021. Hawaii, Montana, Vermont, Alaska, and Maine are among the States where outdoor recreation as a percent of that States' GDP ranks the highest. For example, in 2021, outdoor recreation accounted for \$4.4 billion of Hawaii's \$91.1 billion overall GDP, or 4.8 percent – the highest proportion of any State. In terms of actual levels, the States that produced the highest outdoor recreation GDP in 2021 were California (\$54.7 billion), Florida (\$41.9 billion), and Texas (\$37.5 billion).

Differences in interpretation between regulated entities and enforcement officials may be hindering consistent enforcement practices, thereby impacting business-related decisions in providing transportation for recreational activities. This rulemaking would resolve this information asymmetry by creating a common understanding between FMCSA and motor carriers. Because this rulemaking may also lead to an increase in exemption use, it would benefit existing carriers by improving the efficiency of their business operations and increasing both consumer and producer surplus.

For new potential providers of recreational activities that were not aware of this exemption, this rulemaking may encourage new entrants into the field. The costs of maintaining year-round financial responsibility and paying registration fees may have posed a barrier to entry that discouraged some entities from participating in this industry. Therefore, this proposed rule may introduce new businesses into the field, increase competition and market efficiency, and benefit consumers by creating more options when choosing a provider of recreational activities.

#### **B. Congressional Review Act**

This proposed rule is not a *major rule* as defined under the Congressional Review Act (5 U.S.C. 801–808).<sup>29</sup>

#### **C. Advance Notice of Proposed Rulemaking**

Under 49 U.S.C. 31136(g), FMCSA is required to publish an advance notice of proposed rulemaking (ANPRM) or proceed with a negotiated rulemaking, if a proposed rule is likely to lead to the promulgation of a major rule. As this proposed rule is not likely to result in the promulgation of a major rule, the Agency is not required to issue an ANPRM or to proceed with a negotiated rulemaking.

#### **D. Regulatory Flexibility Act**

The Regulatory Flexibility Act of 1980, Pub. L. 96-354, 94 Stat. 1164 (5 U.S.C. 601-612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121, 110 Stat. 857, March 29, 1996) and the Small Business Jobs Act of 2010 (Pub. L. 111-240, 124 Stat. 2504, September 27, 2010), requires Federal agencies to consider the effects of the regulatory action on small business and other small entities and to minimize any significant economic impact. The term *small entities* comprises

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<sup>29</sup> A *major rule* means any rule that OMB finds has resulted in or is likely to result in (a) an annual effect on the economy of \$100 million or more; (b) a major increase in costs or prices for consumers, individual industries, geographic regions, Federal, State, or local government agencies; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets (§ 389.3).

small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. Accordingly, DOT policy requires an analysis of the impact of all regulations on small entities, and mandates that agencies strive to lessen any adverse effects on these businesses. FMCSA has not determined whether this proposed rule would have a significant economic impact on a substantial number of small entities. Therefore, FMCSA is publishing this initial regulatory flexibility analysis (IRFA) to aid the public in commenting on the potential small business impacts of the proposals in this NPRM. We invite all interested parties to submit data and information regarding the potential economic impact that would result from adoption of the proposals in this NPRM. We will consider all comments received in the public comment process when making a determination in the final regulatory flexibility analysis.

An IRFA must contain the following:

1. a description of the reasons why the action by the agency is being considered;
2. a succinct statement of the objective of, and legal basis for, the proposed rule;
3. a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
4. a description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
5. an identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule.
6. a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.

## **1. Why the Action by the Agency is Being Considered**

Section 23012 of the IIJA amended 49 U.S.C. 13506 by adding a new exemption in paragraph (b)(4) from the operating authority registration requirements. FMCSA is proposing to add a new regulatory section incorporating that statutory exemption and also including a definition for the exempt operations. The exemption from operating authority



registration applies to motor carriers operating a motor vehicle designed or used to transport not fewer than 9, and not more than 15 passengers (including the driver) whether operated alone or with a trailer attached to the transport vehicle, if the motor vehicle is operated by a person that provides recreational activities and the transportation is provided within a 150 air-mile radius of the location at which passengers initially boarded the motor vehicle at the outset of the trip. The new statutory exemption did not include a definition of recreational activities, creating some ambiguity in the exemption's applicability. The Agency is proposing to codify the exemption in regulation and to remove ambiguity by defining the term.

## **2. The Objectives of and Legal Basis for the Proposed Rule**

As discussed in section 1 of this IRFA, FMCSA is proposing to add a new regulatory section incorporating the statutory exemption in 49 U.S.C. 13506 that was added by section 23012 of the IIJA (see 49 U.S.C. 13506(b)(4)). The statutory provision, which relates to operating authority registration and requires, in part, that the motor vehicle be operated “by a person that provides recreational activities,” does not define *recreational activities*. This NPRM proposes to define *recreational activities* to clarify the scope of the exemption applicability.

The FMCSA Administrator has the authority to carry out the functions relating to the registration requirements in 49 U.S.C. 13901 and 13902, as delegated by the Secretary under § 1.87(a)(5). The requirements of these sections, which are enforced under § 392.9a (“Operating authority”), are the basis for the rules governing applications for operating authority registration in 49 CFR part 365.

### **3. A Description of, and Where Feasible an Estimate of, the Number of Small Entities to Which the Proposed Rule Will Apply**

*Small entity* is defined in 5 U.S.C. 601. Section 601(3) defines a *small entity* as having the same meaning as *small business concern* under section 3 of the Small Business Act. This includes any small business concern that is independently owned and operated and is not dominant in its field of operation. Section 601(4), likewise includes within the definition of *small entities* not-for-profit enterprises that are independently owned and operated and are not dominant in their fields of operation. Additionally, section 601(5) defines *small entities* as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000.

This NPRM would affect providers of recreational activities to motor carriers operating a motor vehicle designed or used to transport not fewer than 9, and not more than 15 passengers (including the driver) whether operated alone or with a trailer attached to the transport vehicle, if the motor vehicle is operated by a person that provides recreational activities and the transportation is provided within a 150 air-mile radius of the location at which passengers initially boarded the motor vehicle at the outset of the trip. Providers of recreational activities affected by this proposed rule operate under many different North American Industry Classification System<sup>30</sup> (NAICS) codes with differing size standards. FMCSA provides a wide range of NAICS codes in the recreational activities industry, in order to capture all of the potential NAICS codes that providers of recreational activities may operate under. In doing so, FMCSA is highlighting many entities that perform various other functions beyond transporting passengers to and from recreational activities. As shown in table 6 below, the SBA size standard for providers of recreational activities ranges from \$8 million in revenue per year for the All Other

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<sup>30</sup> More information about NAICS is available at: <http://www.census.gov/eos/www/naics/> (accessed Dec. 21, 2022).

Amusement Recreation Industries NAICS national industry, to \$41.5 million in revenue per year for Tour Operators and Racetracks.

**Table 6. SBA Size Standards for Selected Industries (in millions of 2019\$)**

NAICS Code	NAICS Industry Description	SBA Size Standard in millions
<b>Subsector 487 – Scenic and Sightseeing Transportation</b>		
487110	Scenic and Sightseeing Transportation, Land	\$18
487210	Scenic and Sightseeing Transportation, Water	\$12.5
487990	Scenic and Sightseeing Transportation, Other	\$22
<b>Subsector 561 – Administrative and Support Services</b>		
561520	Tour Operators	\$41.5
<b>Subsector 711 – Performing Arts, Spectator Sports, and Related Industries</b>		
711212	Racetracks	\$41.5
711219	Other Spectator Sports	\$14.5
<b>Subsector 713 – Amusement, Gambling, and Recreation Industries</b>		
713910	Golf Courses and Country Clubs	\$16.5
713920	Skiing Facilities	\$31.0
713940	Fitness and Recreational Sports Centers	\$15.5
713990	All Other Amusement Recreation Industries	\$8.0

FMCSA examined data from the 2017 Economic Census, the most recent Census for which data were available, to determine the percentage of firms that have revenue at or below SBA’s thresholds within each of the NAICS industries.<sup>31</sup> Boundaries for the revenue categories used in the Economic Census do not exactly coincide with the SBA thresholds. Instead, the SBA threshold generally falls between two different revenue categories. However, FMCSA was able to make reasonable estimates as to the percent of small entities within each NAICS code.

The Agency estimates that many entities affected by this NPRM may fall under the Scenic and Sightseeing Transportation NAICS subsector (487). Firms in this subsector utilize transportation equipment to provide recreation and entertainment. These operations are distinct from passenger transportation carried out for other types of for-hire transportation. The recreational activities involved are local in nature, usually

<sup>31</sup> U.S. Census Bureau. *2017 Economic Census*. Available at: <https://data.census.gov/cedsci/table?q=EC1700&n=48-49&tid=ECNSIZE2017.EC1700SIZEREVEST&hidePreview=true> (accessed Dec. 18, 2022).

involving a same-day return to the point of departure.<sup>32</sup> Industry groups under this subsector include Scenic and Sightseeing Transportation, Land (4871), Scenic and Sightseeing Transportation, Water (4872), and Scenic and Sightseeing Transportation, Other (4879).

The Scenic and Sightseeing Transportation, Land NAICS national industry (487110) has a revenue size standard of \$18 million, which falls between two Economic Census revenue categories, \$10 million and \$25 million. This industry comprises firms engaged in various outdoor excursions, including horse-drawn sightseeing rides. The percentages of Scenic and Sightseeing Transportation, Land with revenue less than these amounts ranged from 97 percent to 98 percent. Because the SBA threshold is closer to the higher of these two boundaries, FMCSA has assumed that the percent of Scenic and Sightseeing Transportation, Land entities that are small will be closer to 98 percent and is using that figure.

For Scenic and Sightseeing Transportation, Water (487210), the \$12.5 million SBA threshold falls between two Economic Census revenue categories, \$10 million and \$25 million. Entities in this national industry are primarily engaged in providing scenic and sightseeing transportation on water, such as fishing boat charter operation. The percentages of Scenic and Sightseeing Transportation, Water with revenue less than these amounts ranged from 97 percent to 99 percent. Because the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of these entities that are small will be closer to 97 percent and is using that figure.

Scenic and Sightseeing Transportation, Other (487990) focuses on all other scenic and sightseeing transportation, such as hot air balloon rides and glider excursions. The SBA size standard for this national industry is \$22 million. The \$22 million SBA

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<sup>32</sup> US Census Bureau 2022 NAICS Definition. Available at <https://www.census.gov/naics/?input=48&year=2022&details=487> (accessed Jan. 5, 2023).

threshold falls between two Economic Census revenue categories, \$10 million and \$25 million. The percentages of these entities with revenue less than these amounts were 93 percent and 98 percent. Because the SBA threshold is closer to the higher of these two boundaries, FMCSA has assumed that the percent of these providers that are small will be closer to 98 percent and is using that figure.

Firms falling under the Travel Arrangement and Reservation Services industry group (5615) may also be impacted by this NPRM. This industry group comprises the Travel Agencies (561510), Tour Operators (561520), and Convention and Visitors Bureaus (561591) national industries.<sup>33</sup> The Agency assumes that providers of recreational activities fall under the Tour Operators national industry.

Tour Operators (561520) focuses on arranging and assembling tours, including travel or wholesale tour operators. The SBA size standard for this national industry is \$41.5 million, which falls between two Economic Census revenue categories, \$25 million and \$100 million. The percentages of Tour Operators with revenue less than these amounts were 92 percent and 100 percent. The Agency presents a high-end estimate of 100 percent due to limitations in Economic Census data availability. Revenue data for firms with revenue less than \$100,000, which would be considered small, are suppressed by the Economic Census to avoid disclosing for individual companies. Because the Agency is unable to ascertain the revenue for the suppressed firms, the high-end estimate assumes that such firms may fall under the \$41.5 million SBA threshold and would be considered small. The low-end estimate assumes the suppressed firms are not small. Because the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of Tour Operators that is small will be closer to 92 percent and is using that figure.

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<sup>33</sup> US Census Bureau 2022 NAICS Definition. Available at <https://www.census.gov/naics/?input=56&year=2022&details=5615> (accessed Jan. 5, 2023).

The Agency estimates that many providers of recreational activities affected by this NPRM would also fall under the Arts, Entertainment, and Recreation sector (71). This sector includes a wide range of firms operating facilities that meet varied cultural, entertainment, and recreational interests of patrons.<sup>34</sup> Subsectors under this group include Performing Arts, Spectator Sports, and Related Industries (711), Amusement, Gambling, and Recreational Industries (713), and others.

The industry groups under the Spectator Sports and Related Industries (711) subsector cover Spectator Sports (7112). Spectator Sports includes the Racetracks (711212) and Other Spectator Sports (711219) national industries.

The Racetracks national industry (711212) focuses on firms operating racetracks without casinos, such as auto, motorcycle, snowmobile, and horse races. The SBA size standard for this national industry is \$41.5 million. The \$41.5 million SBA threshold falls between two Economic Census revenue categories, \$25 million and \$100 million. The percentages of these entities with revenue less than these amounts were 83 percent and 100 percent.<sup>35</sup> Because the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of Racetracks entities that are small will be closer to 83 percent and is using that figure.

Other Spectator Sports (711219) focuses on independent athletes, owners of racing participants (such as cars, dogs, and horses), and firms engaged in specialized services in support of said participants. The SBA size standard for this national industry is \$14.5 million, which falls between two Economic Census revenue categories, \$10 million and \$25 million. The percentages of these entities with revenue less than these

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<sup>34</sup> US Census Bureau 2022 NAICS Definition. Available at <https://www.census.gov/naics/?input=71&year=2022&details=71> (accessed Jan. 5, 2023)

<sup>35</sup> The Agency presents a high-end estimate of 100 percent due to limitations in Economic Census data availability. Revenue data for firms with revenue less than \$100,000, which would be considered small, are suppressed by the Economic Census to avoid disclosing for individual companies. Because the Agency is unable to ascertain the revenue for the suppressed firms, the high-end estimate assumes that such firms may fall under the \$41.5 million SBA threshold. The low-end estimate assumes the suppressed firms are not small.

amounts were 82 percent and 100 percent.<sup>36</sup> Because the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of Other Spectator Sports entities that are small will be closer to 82 percent and is using that figure.

The industry groups under the Amusement, Gambling, and Recreation Industries (713) subsector include Amusement Parks and Arcades (7131), Gambling Industries (7132), and Other Amusement and Recreation Industries (7139).<sup>37</sup> The Agency estimates the entities affected by this NPRM would fall into the third industry group, Other Amusement and Recreation Industries (7139). This group, as detailed below, covers firms operating golf courses and country clubs, skiing facilities, and all other amusement and recreation activities.<sup>38</sup>

Entities falling under Golf Courses and Country Clubs (713910) primarily engage in operating such facilities, and providing food and beverage services, equipment rental, or golf instruction. The SBA size standard for this national industry is \$16.5 million, which falls between two Economic Census revenue categories, \$10 million and \$25 million. The percentages of Golf Courses and Country Clubs with revenue less than these amounts were 95 percent and 99 percent. Because the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of these entities that are small will be closer to 95 percent and is using that figure.

Skiing Facilities (713920) industries primarily operate downhill, cross country, or related skiing areas, and provide food and beverage services, equipment rental, and ski instruction. The SBA size standard for this national industry is \$31 million, which falls

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<sup>36</sup> The Agency presents a high-end estimate of 100 percent due to limitations in Economic Census data availability. Revenue data for firms with revenue less than \$100,000, which would be considered small, are suppressed by the Economic Census. Because the Agency is unable to ascertain the revenue for the suppressed firms, the high-end estimate assumes that such firms may fall under the \$14.5 million SBA threshold. The low-end estimate assumes the suppressed firms are not small.

<sup>37</sup> US Census Bureau 2022 NAICS Definition. Available at <https://www.census.gov/naics/?input=71&year=2022&details=713> (accessed Jan. 5, 2023).

<sup>38</sup> US Census Bureau 2022 NAICS Definition. Available at <https://www.census.gov/naics/?input=71&year=2022&details=7139> (accessed Jan. 5, 2023).

between two Economic Census revenue categories, \$25 million and \$100 million. The percentages of Skiing Facilities with revenue less than these amounts were 93 percent and 98 percent.<sup>39</sup> Because the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of these facilities that are small will be closer to 93 percent and is using that figure.

The Agency estimates that the majority of entities affected by this NPRM would fall under the All Other Amusement Recreation Industries national industry (713990). This includes whitewater rafting, hunting, horseback riding stables, boating clubs, canoeing, archery and shooting ranges, hiking, and others. The SBA size standard for this national industry is \$8 million. The \$8 million SBA threshold falls between two Economic Census revenue categories, \$5 million and \$10 million. The percentages of these providers with revenue less than these amounts were 60 percent and 99.6 percent. The Agency estimates a wide range in estimates due to limitations in Economic Census data for this NAICS category. Specifically, of the 12,688 firms in this industry, 12,631 have revenue between \$100,000 and \$10 million. However, data on small entities with revenue under \$250,000 are suppressed. There are 7,490 small entities (59 percent) with revenue between \$250,000 and \$5 million, and 139 firms with revenue between \$5 million and \$10 million (1.1 percent). Of the 12,688 firms in All Other Amusement Recreation Industries, there are firms 5,002 without revenue data (39.4 percent). The high-end estimate assumes all such firms are small (99.6 percent) and FMCSA is using that figure.

Table 7 below shows the complete estimates of the number of small entities within the national industries that may be affected by this rulemaking.

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<sup>39</sup> The Agency presents a high-end estimate of 98 percent which includes assumptions about limitations in Economic Census data. Some revenue data for firms that would be considered small (revenue categories of \$100,000 or more and \$250,000 to \$499,999) are suppressed by the Economic Census. Because the Agency is unable to ascertain the revenue for the suppressed firms, the high-end estimate assumes that such firms may fall under the \$31 million SBA threshold. The low-end estimate assumes the suppressed firms are not small.



**Table 7. Estimates of Numbers of Small Entities**

<b>NAICS Code</b>	<b>Description</b>	<b>Total Number of Firms</b>	<b>Number of Small Entities</b>	<b>Percent of all Firms</b>
487110	Scenic and Sightseeing Transportation, Land	520	512	98%
487210	Scenic and Sightseeing Transportation, Water	1,129	1,097	97%
487990	Scenic and Sightseeing Transportation, Other	169	165	98%
561520	Tour Operators	2,175	1,991	92%
711212	Racetracks	299	248	83%
711219	Other Spectator Sports	1,916	1,577	82%
713910	Golf Courses and Country Clubs	8,076	7,712	95%
713920	Skiing Facilities	203	189	93%
713990	All Other Amusement Recreation Industries	12,688	7,629	60%

**4. A Description of the Proposed Reporting, Recordkeeping and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities Which Will be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record**

This proposed rule would not result in new recordkeeping requirements.

**5. An Identification, to the Extent Practicable, of All Relevant Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule**

FMCSA is not aware of any relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule.

**6. A Description of Any Significant Alternatives to the Proposed Rule Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities**

Given that the recreational activities exemption was statutorily mandated, FMCSA did not have an alternative or discretion as to whether to adopt the exemption but did consider whether to propose a definition of the term *recreational activities* or to remain silent. FMCSA also considered the alternative of adding a definition without including specific examples. However, FMCSA believes that remaining silent or proposing a definition without specific examples could result in confusion or inconsistent

enforcement and that it was better to propose a definition with examples consistent with the legislative intent to minimize any significant economic impact on small entities.

#### **7. Description of Steps Taken by a Covered Agency to Minimize Costs of Credit for Small Entities**

FMCSA is not a covered agency as defined in section 609(d)(2) of the Regulatory Flexibility Act and has taken no steps to minimize the additional cost of credit for small entities.

#### **8. Requests for Comment to Assist Regulatory Flexibility Analysis**

FMCSA requests comments on all aspects of this initial regulatory flexibility analysis.

#### **E. Assistance for Small Entities**

In accordance with section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, 110 Stat. 857), FMCSA wants to assist small entities in understanding this proposed rule so they can better evaluate its effects on themselves and participate in the rulemaking initiative. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult the person listed under FOR FURTHER INFORMATION CONTACT.

Small businesses may send comments on the actions of Federal employees who enforce or otherwise determine compliance with Federal regulations to the Small Business Administration’s Small Business and Agriculture Regulatory Enforcement Ombudsman (Office of the National Ombudsman, see <https://www.sba.gov/about-sba/oversight-advocacy/office-national-ombudsman>) and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency’s responsiveness to small business. If you wish to comment on actions by employees of FMCSA, call 1-888-REG-FAIR (1-888-734-3247). DOT has a policy

regarding the rights of small entities to regulatory enforcement fairness and an explicit policy against retaliation for exercising these rights.

**F.      Unfunded Mandates Reform Act of 1995**

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) (UMRA) requires Federal agencies to assess the effects of their discretionary regulatory actions. The Act addresses actions that may result in the expenditure by a State, local, or Tribal government, in the aggregate, or by the private sector of \$178 million (which is the value equivalent of \$100 million in 1995, adjusted for inflation to 2021 levels) or more in any 1 year. Though this NPRM would not result in such an expenditure, and the analytical requirements of UMRA do not apply as a result, the Agency discusses the effects of this proposed rule elsewhere in this preamble.

**G.      Paperwork Reduction Act**

This proposed rule contains no new information collection requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

**H.      E.O. 13132 (Federalism)**

A rule has implications for federalism under section 1(a) of E.O. 13132 if it has “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” FMCSA has determined that this proposed rule would not have substantial direct costs on or for States, nor would it limit the policymaking discretion of States. Nothing in this document preempts any State law or regulation. Therefore, this proposed rule does not have sufficient federalism implications to warrant the preparation of a Federalism Impact Statement.

**I.      Privacy**

The Consolidated Appropriations Act, 2005,<sup>40</sup> requires the Agency to assess the privacy impact of a regulation that will affect the privacy of individuals. This NPRM would not require the collection of personally identifiable information.

The Privacy Act (5 U.S.C. 552a) applies only to Federal agencies and any non-Federal agency that receives records contained in a system of records from a Federal agency for use in a matching program.

The E-Government Act of 2002,<sup>41</sup> requires Federal agencies to conduct a Privacy Impact Assessment (PIA) for new or substantially changed technology that collects, maintains, or disseminates information in an identifiable form. No new or substantially changed technology would collect, maintain, or disseminate information as a result of this rulemaking. Accordingly, FMCSA has not conducted a PIA.

In addition, the Agency submitted a Privacy Threshold Assessment (PTA) to evaluate the risks and effects the proposed rulemaking might have on collecting, storing, and sharing personally identifiable information. The DOT Privacy Office has determined that this rulemaking does not create privacy risk.

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<sup>40</sup> Pub. L. 108-447, 118 Stat. 2809, 3268, note following 5 U.S.C. 552a (Dec. 4, 2014).

<sup>41</sup> Pub. L. 107-347, sec. 208, 116 Stat. 2899, 2921 (Dec. 17, 2002).

**J. E.O. 13175 (Indian Tribal Governments)**

This proposed rule does not have Tribal implications under E.O. 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

**K. National Environmental Policy Act of 1969**

FMCSA analyzed this proposed rule pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.) and determined this action is categorically excluded from further analysis and documentation in an environmental assessment or environmental impact statement under FMCSA Order 5610.1 (69 FR 9680), Appendix 2, (6)(b). The categorical exclusion (CE) in paragraph (6)(b) covers regulations which are editorial or procedural, such as, those updating addresses or establishing application procedures, and procedures for acting on petitions for waivers, exemptions and reconsiderations, including technical or other minor amendments to existing FMCSA regulations. The proposed requirements in this rule are covered by this CE, there are no extraordinary circumstances present, and the proposed action does not have the potential to significantly affect the quality of the environment.

**List of Subjects in 49 CFR Part 372**

Agricultural commodities, Buses, Cooperatives, Freight forwarders, Motor carriers, Moving of household goods, Seafood.

Accordingly, FMCSA proposes to amend 49 CFR part 372 as follows:

**PART 372—EXEMPTIONS, COMMERCIAL ZONES, AND TERMINAL AREAS**

1. The authority citation for part 372 continues to read as follows:

Authority: 49 U.S.C. 13504 and 13506; Pub. L. 105-178, sec. 4031, 112 Stat. 418; and 49 CFR 1.87.

2. Amend § 372.107 by adding paragraph (i) to read as follows:

**§ 372.107 Definitions.**

\* \* \* \* \*

(i) *Recreational activities*. The term recreational activities means activities consisting of an outdoor experience or excursion typically of a physical or athletic nature which require transportation for the sole purpose of moving customers to another location or locations where the outdoor experience or excursion will take place and collecting those customers to transport them back to the place of initial boarding or another outpost of the motor carrier. Recreational activities include but are not limited to hiking, biking, horseback riding, canoeing, whitewater rafting, water trails, tubing, skiing, snowshoeing, snowmobiling, hunting, fishing, mountain climbing, and swimming. The term does not include any activity for which:

(1) The activity offered or sold is occurring simultaneously with the transportation; or

(2) For which the transportation is the primary service offered for sale.

3. Add § 372.113 to read as follows:

**§ 372.113 Providers of recreational activities.**

Transportation by a motor vehicle designed or used to transport not fewer than 9, and not more than 15, passengers (including the driver), whether operated alone or with a trailer attached for the transport of recreational equipment, is exempted from regulation promulgated pursuant to part B of title 49 U.S.C. subtitle IV if:

(a) The motor vehicle is operated by a person that provides recreational activities;

(b) The transportation is provided within a 150 air-mile radius of the location at which passengers initially boarded the motor vehicle at the outset of the trip; and

(c) In the case of a motor vehicle transporting passengers over a route between a place in a State and a place in another State, the person operating the motor vehicle is

lawfully providing transportation of passengers over the entire route in accordance with applicable State law.

Issued under authority delegated in 49 CFR 1.87.

**Robin Hutcheson,**

*Administrator.*

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